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COURT OF CRIMINAL APPEALS
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No. PD-1130-19

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

MARVIN RODRIGUEZ, Appellant

v.

STATE OF TEXAS, Appellee

On the granting of Appellant's Petition for Discretionary Review in cause number PD-1130-19, from the Fort Worth Court of Appeals for the Second Court of Appeals District, cause number 02-17-00371-CR.

APPELLANT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Appellant was indicted for murder. CR 7. He pled not guilty. RR III - 26. A Tarrant County jury found him guilty of murder and assessed a punishment of twenty years in prison. RR XIII - 4. Appellant filed notice of appeal on November 2, 2017. CR 162.

A panel of the Fort Worth Court of Appeals affirmed the judgment and sentence in Appellant's case on August 19, 2019. *See Rodriguez v. State*, No. 02-17-00371-CR, 2019 WL 3491647 (Tex. App.—Fort Worth Aug. 19, 2019) (unpublished). Appellant filed a motion for rehearing which was overruled by the Fort Worth Court on September 26, 2019.

Appellant filed a petition for review in this Court. That petition was granted on November 4, 2020.

ISSUES PRESENTED

1. Under this Court's precedents, Appellant sufficiently admitted to the offense of murder. The Fort Worth Court mistakenly said he did not.
2. When analyzing confession and avoidance, a court should view the admissions and the actions of the defendant within the context of the entire episode and not focus myopically on the moment of the defendant's final criminal act.
3. The retention of the confession and avoidance rule is unnecessary.

STATEMENT OF FACTS

Appellant shot Richard Sells during a large-scale brawl in the parking lot of Cowboys Stadium during a football game. Mr. Sells died later.

At trial, Appellant testified and presented evidence that he saw his brother (Candido) get punched, go to the ground, and get kicked by several men. RR IX – 27. Appellant ran over to help, but was himself punched and knocked over twice. RR IX – 30. He went to his car to get a pistol. RR IX – 31.

Appellant grabbed one man in the pile with his brother, put the gun to his neck, and said something threatening to him. RR V – 174-76, 205; IX – 33, 36. Another pile formed on Candido, with one man kneeling on Candido with all his weight. RR IX – 45. Candido was screaming in pain. RR IX – 45. Appellant figured if he did not intercede, the gang of men would attack him and kill him. RR IX – 49. Appellant grabbed the man on top of Candido – Richard Sells – and put the gun to his neck. RR IX – 45.

Appellant had Sells in a headlock. RR IX – 46. Sells pushed back against Appellant while Appellant pulled the gun. RR IX – 47. At the same time, someone else was trying to pull on the gun. RR IX – 46. According to Appellant, this caused the weapon to discharge. RR IX – 47. Sells was hit. RR IX – 47. The others scattered, and Appellant stood in shock for a few seconds, then ran off. RR IX – 48-49. Sells was removed from life support after two days in the hospital. RR V – 109.

ARGUMENT AND AUTHORITIES

Appellant presented various defenses at trial (self-defense, defense of a third person, and necessity), but the trial court refused to instruct the jury on those defenses. A panel of the Fort Worth Court affirmed this decision, finding that Appellant failed to "substantially admit the charged offense." *Rodriguez*, 2019 WL 3491647 at *5.

Appellant will show that the Fort Worth Court's analysis parsed Appellant's testimony too heavily, that its opinion misconstrued caselaw from this Court, that Appellant did substantially admit to the charged offense, that any analysis of "confession and avoidance" should contextually include events leading up to the charged offense, and that – alternatively – no defendant should be required to admit to the charged offense in order to receive a requested defensive charge.

1. "Confession and avoidance" – the current rule obliging a defendant to "admit" to the charged offense.

Generally speaking, a defendant must admit to all elements of an offense before he will be entitled to a defensive instruction. *See Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999). Such a requirement is rooted in civil pleading rules and is known as "confession and avoidance." *See Juarez v. State*, 308 S.W.3d 398, 402 (Tex. Crim. App. 2010). However, in cases like *Gamino v. State*, 537 S.W.3d

507 (Tex. Crim. App. 2017), this Court indicated that, in his testimony, a defendant need not "concede the State's version of events," and that "[a]dmitting to the conduct does not necessarily mean admitting to every element of the offense." *Id*. at 512.

Most courts – including, at times, this Court – have regarded this rule as an affirmative obligation a defendant must perform before receiving a defensive jury instruction. However, the contours of this rule remain unclear.

2. *Ebikam* dictates the result in Appellant's case – his self-defense claim should have been heard by the jury.

Subsequent to the filing of Appellant's petition, this Court handed down its opinion in *Ebikam v. State*, No. PD-1199-18, 2020 WL 3067581 (Tex. Crim. App. June 10, 2020) (unpublished).

The issue in *Ebikam* was whether a defendant had to admit the manner and means of an assault as charged by the State in order to meet the requirements of confession and avoidance. *Ebikam*, 2020 WL 3067581 at *1. This Court held that he did not; a defendant could admit and assault by a different manner and means and still be entitled to a self-defense instruction. *Id*. at *4.

But, as relates to Appellant's situation, the theme of *Ebikam* is that the doctrine of "confession and avoidance" will no longer be treated like a sacrosanct rule in which a defendant must make a precise confession to a precise criminal

allegation before he can receive the apparent absolution of a self-defense instruction. A "flat denial" of conduct (*i.e.*, "I wasn't there") "will foreclose an instruction on a justification defense." *Id*. at *3. But inconsistencies, weasel-words, or mere implied admissions to the conduct in question should now, generally, suffice: "Consequently, although one cannot justify an offense that he insists he did not commit, he may equivocate on whether he committed the conduct in question and still get a justification instruction." *Id*.

Appellant explained what happened at the stadium parking lot. He testified that he was in fear of his life and the life of his brother. When he saw that defense with his fists was futile, Appellant went to his car and got a pistol. RR IX - 31. He threateningly pointed the pistol at one person, told him to get out of here, and then grabbed Mr. Sells and pointed the gun at his neck. RR IX – 33, 45. Appellant testified that he did not intend to kill Mr. Sells. He felt someone pull back on the pistol, and when he counteracted that movement, "The pistol went off." RR IX – 47.

Despite Appellant's denial of intent at the moment of the shooting, a reviewing court should look "at what the defensive evidence implied and not merely what it proclaimed." *Ebikam*, 2020 WL 3067581 at *2. Appellant's apparent denial of the intent to kill in the final moment does not erase his mental state as he approached the gang with a gun. As his testimony indicated, his life and the life of his brother were in danger and the implication was that he was going to prevent that

at the point of a gun, if necessary. *Ebikam*'s reference to several cases helps to illustrate this point clearly. *See, e.g., Gamino*, 537 S.W.3d at 511 (aggravated assault defendant denied threatening victim with gun, but also said that, while holding his gun at his side, he told the victim to stop, get away, and leave us alone); *Alonzo v. State*, 353 S.W.3d 778, 783 (Tex. Crim. App. 2011) (defendant's denial of intent to kill should not have prevented jury from being instructed on self-defense where defendant also testified that fight took place in prison cell containing metal spike, with defendant stating "it could have been me that got stuck too with that weapon"); *Juarez*, 308 S.W.3d at 404 (defendant denied biting victim on purpose, but also testified that he bit because he was being suffocated by him). Historically then, there simply is no mechanistic rule that would require that a defendant clearly admit to every element of an offense in order to receive a jury instruction on justification.

Of the cases cited by this Court in *Ebikam*, *Martinez* is the most one most factually similar to Appellant's case. *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989).

In *Martinez*, the defendant shot the victim during an altercation. *Id*. at 646. The testimony at the murder trial was contradictory, but Martinez testified that the victim punched him twice, and he thought the victim had a knife. *Id*. The victim had also threatened to kill him, according to Martinez. *Id*. Martinez said that he pulled out a gun and merely fired it into the air; however, his mother-in-law grabbed his

arm, the gun went off several times, and the victim was accidentally shot. *Id*. The trial court denied Martinez's request for a self-defense instruction, a decision the court of appeals affirmed because Martinez had failed to admit he intended to kill the victim. *Id*. at 647.

This Court reversed, holding:

> After thoroughly examining the record, we conclude that appellant did sufficiently admit to the commission of the offense. Appellant admitted to pulling out the gun, firing it into the air, and having his finger on the trigger when the fatal shot was fired. While appellant specifically denied intending to kill Gonzales, this alone does not preclude an instruction on self-defense.

Id.

Just like Martinez, Appellant testified that – though he retrieved the weapon to defend himself and even pointed it at those he believed were doing him and his brother harm – he himself did not intend to fire the pistol at the moment that it discharged. Martinez said it was his mother-in-law; Appellant testified it was an unknown person who grabbed his arm from behind. *See* RR IX – 101-02.

Indeed, Appellant even admitted that his finger must have been on the trigger at the final moment. Though he equivocated at first, he ultimately conceded on cross-examination that his finger must have been there:

Prosecutor: Your finger was on the trigger, was it not?

Appellant: I don't recall, ma'am. I was holding the pistol.

Prosecutor: Well, how did the gun go off if your finger's not on the trigger, sir?

Appellant: I mean, holding it, it may have gotten on there. I was trying to hold it tight and it was being snugged in.

Prosecutor: Your finger was on the trigger. That's the only way this gun goes off, correct?

Appellant: **That's the only way it would have gone off, yes, ma'am.**

RR IX – 89-90 (emphasis added).

This was, obviously, no "flat denial" of Appellant's conduct. *Ebikam*, 2020 WL 3067581 at *3. Nor did it "completely foreclose[]" the commission of a murder. *Id*. at *4. Appellant admitted defending himself and his brother with a gun, and he admitted being the agent of the killing. Thus, even without a full-fledged "confession," there was sufficient evidence to send justification instructions to the jury.

Accordingly, under this Court's cases, Appellant sufficiently admitted to the offense of murder and presented evidence which justified the submission to the jury of Appellant's requested instructions.

3. "Accidental" killings don't occur in a vacuum. The context of the events leading up to an arrest should be scrutinized before a court determines that a defendant's admission was insufficient.

Another way to analyze Appellant's admissions in the context of his justification claims is to view what happened in the events leading up to the killing.

What happened to Mr. Sells was part of a process, not a suddenly impulsive act on Appellant's part. A person's decision to act in self-defense is hardly limited to the moment he pulls the trigger. Indeed, in this case, the death of Mr. Sells would not have occurred but for the defensive actions taken by Appellant and leading up to the final gunshot. Thus, it would make more sense to focus on Appellant's justification *during that entire process* rather than confine that view to Appellant's reasoning during the last quarter-second of the unfolding events. This Court has already refused to limit its consideration of a defendant's admissions to the critical moment of the shooting, finding that the events leading up to that shooting were more important:

> It is true that she stated she did not intend to shoot the gun. The court, in view of this testimony, charged on accident. Evidently the jury did not believe that the gun was fired by accident. However, appellant, under her testimony, was entitled to have the jury instructed on the law of self-defense. Under such a charge, even though the jury found that the firing was not an accident, it may have had a reasonable doubt as to whether she was defending herself against an unlawful attack, real or apparent, giving rise to a reasonable apprehension of losing her life or suffering serious bodily injury.

Garcia v. State, 492 S.W.2d 592, 596 (Tex. Crim. App. 1973). *See also Sanders v. State*, 632 S.W.2d 346, 348 (Tex. Crim. App. 1982) ("In a situation such as this, the shooting of the victim does not have to be intentional in order to warrant an instruction on self-defense."); *Merritt v. State*, 213 S.W. 941, 942 (Tex. Crim. App. 1919) ("If appellant was placed in such position by the circumstances as gave him the legal right to defend against an unlawful attack on the part of Johnson, causing him to have a reasonable expectation or fear of death or serious bodily injury, his right of self-defense would inure regardless of whether the discharge of the pistol was accidental or otherwise.").

Accordingly, there is historical precedent in Texas for examining the entire context of a defendant's statements for evidence of justification – rather than simply focusing on the final instant. This analysis is congruent with *Juarez* and *Martinez* (and, now, *Ebikam*). It allows a reviewing court to view a defendant's admissions in context with *all* of his actions – and view more completely the defendant's state of mind prior to the critical moment.

Florida, despite its own "confession and avoidance" rule[1], recognizes that even accidental conduct could come at the end of a series of actions which are basically defensive.

[1] *See Pimentel v. State*, 442 So. 2d 228 (Fla. 3d DCA 1983) (a defendant's testimony that his assault was accidental will generally preclude an instruction on self-defense), *rev. denied*, 450

> However, where there is evidence indicating that the accidental infliction of an injury and the defense of self defense or defense of another are so intertwined that the jury could reasonably find that the accident resulted from the justifiable use of force, an instruction on self defense or defense of another is not logically precluded. Under such circumstances, the assertion that the injury was unintended or accidental does not disprove the defendant's claim that he was acting in self defense or in defense of another. Accordingly, under these circumstances, the appropriate defensive instruction should be given.

Williams v. State, 588 So.2d 44, 45 (Fla. 1st DCA 1991).

Even with a "confession and avoidance" rule, it is important not to divorce a defendant's actions (and his admissions) from the context of the factual situation. Appellant didn't simply find a gun on the ground, claim to accidentally shoot someone, and then assert self-defense. As in *Williams*, there was a sequence of defensive actions that was "intertwined" with the ultimate shooting by Appellant of Mr. Sells. It makes no sense to deprive the jury of the ability to decide a defensive issue when that issue permeated everything about Appellant's trial testimony. For the Fort Worth Court of Appeals, however, confession and avoidance became a mere checklist that, in the panel's view, Appellant failed to complete. This Court should correct that myopic view.

So. 2d 488 (Fla. 1984). The Florida courts refer to this rule as "admission and avoidance." *See Keyes v. State*, 804 So.2d 373, 375 (Fla. 4th DCA 2001).

4. Do we really need this rule?

If this Court's opinion in *Ebikam* constitutes binding authority[2], then perhaps the confession and avoidance "rule" has been relaxed to an extent that it doesn't really function as the checklist that the Fort Worth Court turned it into in Appellant's case. But it still seems to be a rule, and it seems that this Court believes it is a rule worth keeping. *See Ebikam*, 2020 WL 3067581 at *3 ("On the contrary, overruling our confession and avoidance cases would provoke inconsistency and confusion because of the doctrine's extensive influence."). If so, Appellant would briefly take issue with a need to retain this rule.

A. The dubious source of this rule.

As Judge Keasler put it in the context of a completely different rule, "This may need to go the way of whalebone corsets and high-button shoes." *Shumway v. State*, Nos. PD-0108, 109-20 (recording of oral argument at 3:07). The rule of "confession and avoidance" was dragged into the criminal-law-affirmative-defenses arena by *Kimbro v. State*, 249 S.W.2d 919 (Tex. Crim. App. 1952). But *Kimbro's* reliance on the doctrine of this old pleading rule was irrelevant to that case and, further, its reasoning provides thin gruel for following that rule today.

[2] *Ebikam* was ordered not to be published. *See* TEX. R. APP. P. 77.3 (unpublished opinions may not be cited as authority).

Kimbro involved a trial for driving while intoxicated. *Kimbro*, 249 S.W.2d at 919. Kimbro testified that he drank a half pint of whiskey, but did so in one gulp *after* his arrest. *Id*. at 920. He therefore wanted an instruction to the jury that if they believed "that such intoxication resulted from whiskey consumed after his arrest" then they should acquit Kimbro. *Id*. This Court, quite reasonably, pointed out that he was not entitled to such an instruction as Kimbro's "testimony constituted a denial of the truth of the charge that he drove while intoxicated" and that such denial would therefore not amount to an affirmative defense. *Id*. This rule accords with the notion that, for example, a jury should not be instructed on the defense of alibi. *See Giesberg v. State*, 984 S.W.2d 245, 250 (Tex. Crim. App. 1998).[3]

But this Court did not stop there. Relying on a New York trial level opinion from 1900, *Kimbro* goes on to state that an affirmative defense assumes the complaint to be true and that "an affirmative defense is analogous to a plea of confession and avoidance." *Kimbro*, 249 S.W.2d at 920.This second bit of reasoning is unnecessary and makes no sense – as the Court held, Kimbro did not assert an affirmative defense. Therefore, it is completely irrelevant whether a defendant should have to admit to an offense before a jury may be instructed on a defense. In

[3] *Giesberg* changed the law with regard to jury instructions on alibi that existed prior to the enactment of the modern Penal Code in 1973. *See Giesberg*, 984 S.W.2d at 247. However, the general principle is still the same – if it isn't a legal defense, the jury doesn't get charged on it.

other words, Kimbro was denied an affirmative defense because what he wanted wasn't even an affirmative defense – not because he denied being intoxicated.

Further, even if the "rule" of confession and avoidance was relevant to *Kimbro*, this Court's reliance on the reasoning of *Carter v. 8th Ward Bank*, 67 N.Y.S. 300 (N.Y.S.Ct. 1900) is curious. *Carter* – and every other early confession and avoidance case – concerned pleadings in civil cases, not evidence given in the middle of a criminal trial.

Even early defensive pleading rules in criminal trials – such as those rules contemporary with the decision in *Carter* – did not compel a defendant to plead "self-defense" before trial. In fact, "confession and avoidance" pleas in criminal cases prior to 1900 appear to have been limited to non-evidentiary aspects of the court's power to try a defendant – things like jurisdiction and prior jeopardy. *See* FRANKLIN FISKE HEARD, THE PRINCIPLES OF CRIMINAL PLEADING (Univ. of Mich. 1879) at 277-78.[4] This should sound familiar. *See* TEX. CODE CRIM. PROC. art. 28.12 and 28.13 (providing for "special pleas" one of which is former acquittal or conviction).

The point is that this isn't a pleading exercise – a defendant in a felony trial should have an opportunity to avail himself of his right to self-defense without

[4]https://www.google.com/books/edition/The_Principles_of_Criminal_Pleading/MdgzAQAAMAAJ?hl=en&gbpv=0

wading through a thicket of unnecessary rules. If his testimony, and/or other facts developed at trial, are "admitted supporting the defense," then the jury should get to decide the question. *See* TEX. PENAL CODE § 2.03. As Judge Yeary pointed out in his *Ebikam* dissent, "Absolutely nothing in this statutory scheme requires the defense to concede the elements of the offense, in whole or in part, before the defendant may be entitled to a justification defense." *Ebikam*, 2020 WL 3067581 at *7 (Yeary, J., dissenting).

B. What do other states do?

Some states still retain this rule. Florida has already been mentioned – though the rule reasonably does not require the defendant to admit to every element of the offense. *See Williams*, 588 So.2d at 45. Other states with this rule include Illinois. *See People v. Diaz,* 428 N.E.2d 953 (Ill. App. Ct. 1981) ("If, as defendants asserted at trial, they never used any force against the victims, then it follows that they could not have reasonably believed force was necessary to protect themselves."). Most states, such as Washington, appear to simply judge a defendant's admissions within the context of all the evidence at trial. *See State v. Gogolin*, 727 P.2d 683 (Wash. Ct. App. 1986) ("In short, rather than testifying that he feared for his own safety and that he pushed Nancy down the stairs in self-defense, Robert claimed that she fell accidentally."). Other states have specifically refused to require that a defendant admit to the offense before receiving a self-defense instruction. *See State v. Heiskell*,

666 P.2d 207, 212-13 (Kan. Ct. App. 1983) (collecting cases and stating, "They are in line with what appears to be the general rule, at least in homicide cases, that a defendant who denies committing a homicide is nonetheless entitled to a self-defense instruction if that issue is raised by any evidence."); *State v. Taylor*, 200 S.E.2d 387, 388 (S.C. 1973) ("If, however, there is any evidence in the record from which it can be reasonably inferred that the accused inflicted the mortal wound but justifiably did so in self-defense, then the accused is entitled to a charge on the law of self-defense, despite his denial of having inflicted the mortal wound.").

C. The injustice of applying this rule to Appellant's defense-of-a-third-person justification.

In Appellant's case, his brother's testimony should have been sufficient, even if Appellant hadn't testified, to demonstrate the necessity of at least a defense-of-third-person instruction. After spilling some beer on Miguel Tamayo, and thinking the situation had been calmed, Candido turned around but was sucker- punched. RR VIII – 55. He hit the ground and blacked out. RR VIII – 56. As he regained consciousness, someone was choking him, kicking him, and hitting him in the face. Id. He couldn't breathe. Id. Candido felt the blood running down his throat, so he just tucked in his head as the blows rained down on him. Id. He feared for his life – particularly as he couldn't breathe and had the full weight of someone on top of him. RR VIII – 57. Candido started to lose consciousness until he heard a gunshot – the

heavy weight that was on him disappeared. RR VIII – 63. Miguel Tamayo's testimony confirmed that Sells was in the middle of this attack on Candido – Tamayo saw Sells grab Candido around the waist before they fell to the ground in a struggle. RR IX – 196-97. This, of course, underscores Appellant's testimony that he pulled Sells off his brother and put the gun to his neck. But in any event, even if Appellant had failed to admit to the offense, that still should not have prevented the jury from determining whether Appellant was justified in defending Candido.

There is no need for a draconian rule. If the evidence, including a defendant's testimony, does not demonstrate the possibility that he acted in self-defense – fine, there's no reason to instruct the jury on self-defense. However, when a defendant does not testify at all, but other evidence shows he acted in self-defense, there is no reason to deny him the instruction. This is in accord with normal practice and the fundamental principle that a defendant has the "right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the evidence." *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999).

CONCLUSION AND PRAYER

Appellant testified in front of the jury that he shot Mr. Sells because he was afraid for his life and the life of his brother. The Fort Worth Court of Appeals was wrong to affirm the trial court's denial of Appellant's requested jury instructions on the basis that he did not sufficiently admit to the offense. Appellant prays that this Court reverse the Fort Worth Court and remand his case to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 3,992 words.

/s/ Jim Gibson
Jim Gibson

CERTIFICATE OF SERVICE

A copy of this petition has been e-served to the Post-Conviction Section of the Tarrant County Criminal District Attorney's Office, 401 W. Belknap, Fort Worth, Texas 76196 and to the State Prosecuting Attorney, Stacey M. Soule at information@spa.texas.gov on December 21, 2020.

/s/ Jim Gibson
Jim Gibson

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